No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,
Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,
Appellee.

APPELLANT'S CLOSING BRIEF.

EZRA K. SHAPIRO,
S. K. WALZER,
540 Guardian Building, Cleveland, Ohio,
BENJAMIN, LIEBERMAN & ELMORE,
1009 Commercial Exchange Building,
Los Angeles 14, California,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

PAGE

I.

Comment on statement of case 1

II.

Summary judgment rules 1

III.

The entire record must be considered 2

IV.

The record reveals a binding contract 4

1. Price of the goods sufficiently appears 4

2. The agency of Weiner 8

Conclusion 11

TABLE OF AUTHORITIES CITED

Cases.

PAGE

Barton v. Studebaker Corporation of America, 46 Cal. App. 707, 189 Pac. 1025 10

Dickerman v. Ohashi Importing Co., 63 Cal. App. 101, 218 Pac. 458 7

Great Western Distillery Products, Inc. v. J. A. Wathen Distillery Company, 10 Cal. (2d) 442, 74 Pac. (2d) 745 7

McDonnell v. California Lands, Inc., 15 Cal. (2d) 344 10

New York Indemnity Company v. Western Loan and Building Company, 139 Cal. App. 219 10

Statutes.

Rules of Civil Procedure, Rule 8(a)(2) 3

Rules of Civil Procedure, Rule 8(e)(1) 3

Rules of Civil Procedure, Rule 33 4

Rules of Civil Procedure, Rule 56(c) 1, 2

Textbooks.

2 American Jurisprudence, p. 351 10

1 California Jurisprudence, p. 696 10

1 California Jurisprudence, pp. 697, 698 10

1 California Jurisprudence, p. 865 10

No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,
Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,
Appellee.

APPELLANT'S CLOSING BRIEF.

I.

Comment on Statement of Case.

Appellee's "Statement of Case" (Rep. Br. pp. 1, 2) is a fragmentary argumentative condensation of the facts. Appellant's "Statement of the Case" (App. Op. Br. pp. 3 to 13) may be assumed to be correct, since appellee has not taken exception to any part of it.

II.

Summary Judgment Rules.

We find no fault with the rule which captions this portion of Appellee's Brief, that is, that a summary judgment is proper if nothing but questions of law are involved and the questions must be resolved in favor of the moving party.

This case, however, does not come within this rule for there were, in the language of Rule 56(c), Rules of Civil

Procedure, "genuine issues as to material facts," which appellee's extensive argument serves only to confirm.

We reemphasize the rules that a defendant is not entitled to a summary judgment unless the facts conceded show the right to a judgment with such clarity as to leave no room for controversy; that plaintiff would not be entitled to recover under any circumstances; and that it was not the intention of the rule that a case should be tried by affidavits as a substitute for trial in open court (App. Op. Br. pp. 15, 16) of which appellee has made no criticism.

III.

The Entire Record Must Be Considered.

Nor do we find fault with the rule of law that a mere offer to buy goods may be revoked before acceptance.

This rule of law is correct, but in applying it, appellee has lifted out of the complaint the purchase order of June 12, 1944, and utterly ignored all preceding transactions, including the long distance telephone call, the telegrams and correspondence.

The case cannot thus be restricted to the complaint alone. Rule 56(c), Rules of Civil Procedure, provides for full consideration of the "pleadings, depositions, and admissions on file, together with the affidavits" on a motion for summary judgment.

We need not have set forth in the complaint all of the preliminary negotiations and correspondence—the ultimate facts alone are sufficient. Preliminary negotiations and correspondence and such evidence as may be relevant are admissible at the trial in support of the complaint or to rebut any affirmative allegation of the answer.

Rule 8(a)(2), Rules of Civil Procedure, provides that a pleading shall set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

Rule 8(e)(1) provides that "each averment of a pleading shall be simple, concise and direct."

Appellee's argument (Rep. Br. p. 6) concerning appellant's use of the word "non-cancellable" is of no force, because at most the word is surplusage and unnecessary to appellant's cause of action; a binding agreement between two persons cannot be "cancelled" except in the manner provided by law.

Appellee's argument (Rep. Br. p. 6) concerning appellant's delay in answering the wire of cancellation likewise is of no force, for first, there was no obligation to reply thereto; second, Mr. Bernon testified that he made some effort thereafter to get ahold of Weiner about it, and he was out of town for a while [Tr. pp. 38, 39]; and third, he had already made arrangements for segregating the brandy and delivering it to appellee [Tr. pp. 33, 34, 36, 39, 42].

Appellee's argument (Rep. Br. p. 6) that there is nothing in the affidavit or deposition of appellant to indicate that Weiner was authorized to bind appellant by acceptance of the order is met by (1) the fact that a mutual binding agreement was reached over the telephone between the parties directly, and the correspondence confirms this; (2) Bernon testified that the custom of confirmation was dispensed with by the direct dealing of the parties over the telephone [Tr. pp. 45, 46, 47]; and (3) the contention assumes that Weiner was exclusively appellant's agent—the facts show that he was the mutual agent of both parties—of appellant for the purpose of sale, and of appellee for the purpose of purchase [Tr. pp. 45, 40].

IV.

The Record Reveals a Binding Contract.

Under heading IV appellee's principal argument resisting this appeal narrows down to the single contention that no binding contract was entered into because (1) no price was agreed upon and (2) the communications between appellant and Weiner are essential to prove a contract and that they are not admissible because he is appellant's agent.

1. Price of the Goods Sufficiently Appears.

The Appellee's Reply Brief for the first time raises the contention that price was not agreed upon. Immediately following the filing of the answer appellant requested appellee to answer interrogatories under Rule 33, Rules of Civil Procedure. Appellant asked appellee whether there was any reason for endeavoring to cancel the order other than the reason set forth in the telegram of cancellation, that Irven Rose sold his interest in the Los Angeles Liquor Company. The answer given to this interrogatory under oath was:

> "There was still some doubt in our minds whether there would not be some trouble about passing the Brandy with the California authorities, and I decided that it was too much Brandy to order, in view of the fact that Mr. Rose was leaving the Company." [Tr. pp. 9, 11.]

Nothing about no meeting of minds on price.

In support of its motion for summary judgment appellee filed the affidavits of Rose [Tr. pp. 15, 16], Lilien [Tr. pp. 17, 18], Weiner [Tr. pp. 19, 20] and a supplemental affidavit of Lilien [Tr. pp. 74, 75]. There is

nothing in any of these affidavits to the effect that no price was agreed upon. In his supplemental affidavit, Lilien, in short fashion, refers to the long distance telephone conversation with Bernon—he does not relate the conversation at length.

Appellee filed a "Statement of Grounds and Points and Authorities in Support of Motion for Summary Judgment" [Tr. pp. 13, 14]. Nothing appears therein concerning any lack of agreement about price; the sole ground on which the motion was made was that "an order for goods or chattels is merely an offer to buy, not a contract to sell or purchase" and that an order or offer is revocable before acceptance.

Appellee filed in opposition to appellant's motion for summary judgment "Defendant's Statement in Opposition to Motion for Summary Judgment" [Tr. p. 73]. The sole ground stated in opposition to appellant's motion was that the order "was not accepted by the plaintiff and notice of such acceptance given to defendant prior to defendant's cancellation thereof, and that therefore no agreement of sale existed between the parties." Again, nothing about no meeting of minds on price.

Mr. Bernon, in his deposition, related in somewhat cursory fashion his telephone conversation with Lilien [Tr. p. 27], did not purport to relate in detail everything said. Obviously, price was either taken for granted by him or inadvertently overlooked. Hence, the reason for the rule that summary proceedings should not serve to deprive the parties of opportunity for examination and cross-examination and that judgment should not be granted in summary proceedings unless the plaintiff would not be entitled to recover under any circumstance.

The amount of the deposit required by appellant appears in Weiner's letter to appellant dated June 7, 1944 [Tr. p. 62], and in Weiner's wire to appellant dated June 7, 1944 [Tr. p. 63]. In his wire to appellant dated June 9, 1944 [Tr. p. 65], Weiner gives appellant shipping instructions and clearly states the purchase price at $41.55 per case. This purchase price again appears in appellee's air mail, special delivery "purchase order" to appellant, dated June 12, 1944 [Tr. p. 54].

On a motion for summary judgment the burden is on the moving party to show affirmatively that he is entitled to judgment with such clarity as to leave no room for controversy and that plaintiff would not be entitled to recover under any circumstances. Has appellee met these requirements? Can it be said that the prime element of any contract—price—was not thoroughly understood or agreed upon between the parties, when it was not made the subject of barter or dickering in the extensive correspondence in the record? Can it be said that a plenary trial with examination and cross-examination of Lilien, Rose, Weiner and Bernon will not result in testimony that price was not at any time discussed or agreed upon?

In any event the wire of Weiner to appellant dated June 9, 1944, and the purchase order of appellee to appellant dated June 12, 1944, both are complete as to price and both confirm the previous telephone conversation and preliminary correspondence and ripen and bind them into a complete contract.

Moreover, it is the settled law that where no price is specified in a contract for the sale of goods, whether executed or executory, the price is supplied by the implication that a reasonable price is intended.

In *Great Western Distillery Products, Inc., v. J. A. Wathen Distillery Company,* 10 Cal. (2d) 442, 74 Pac. (2d) 745, the Supreme Court of California set forth the rule as follows:

> "The defendant's next contention is that the contract was fatally uncertain in that there is no agreement as to the price of the merchandise to be sold by the defendant and purchased by the plaintiff. There is no fatal uncertainty in this respect. The rule is that when no price is specified in a contract for the sale of goods, whether executory or executed, the price is supplied by the implication that a reasonable price is intended. (Dickerman v. Ohashi Importing Co., 63 Cal. App. 101 (218 Pac. 458); Williston on Sales (2d ed., 1924), sec. 171.) This rule was adopted in the Uniform Sales Act and has been inporated into our law by section 1729 (4) of the Civil Code, which provides as follows: 'Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.' "

See, also:

> *Dickerman v. Ohashi Importing Co.,* 63 Cal. App. 101 at p. 106, 218 Pac. 458, and the cases and text writers therein mentioned.

Since appellee itself in its purchase order fixed $41.55 per case as the purchase price it can hardly now deny that that is a reasonable price within the foregoing rule.

2. The Agency of Weiner.

Appellee contends that Weiner was appellant's agent and therefore all communications between him and appellant are inadmissible; that these communications are essential to the proof of a contract.

We submit first that even if everything concerning Weiner is omitted from the case, a contract is proved. The meeting of the minds of the parties occurred in the telephone conversation on June 5, 1944 [Tr. pp. 27, 47]; nothing remained except to produce a photostatic copy of approval from the Food and Drug Administration [Tr. pp. 27, 47]; this was done at once by the letter of June 5, 1944, from appellant to appellee enclosing the same [Tr. pp. 27, 57, 64]; on June 12, 1944, appellee sent to appellant its purchase order with deposit [Tr. pp. 54, 56]. It was not necessary to complete the contract that this must have been accepted, because the "deal" was made on the 5th of June, 1944 [Tr. pp. 45, 46, 47]. Appellant in the meantime had segregated and made the goods available for delivery to appellee [Tr. pp. 33, 34, 36, 39, 42].

We submit that the evidence was in conflict on the fact as to whether Weiner was appellant's agent or the agent of both parties. Appellee's affidavits, of course, all assert that Weiner was not its agent. In this connection it is obvious that Weiner was by no means an impartial witness; his affidavit was produced by appellee; he sided with appellee; he was not subjected to cross-examination.

Weiner's contention is weakened somewhat by the statement in his affidavit [Tr. p. 19] that he "has been a sales agent of imported wines, brandies and liquors for various companies" for about ten years and that [Tr. p. 20] he "has had other dealings with defendant in the *purchase*

and *sale* of liquors. . . ." (Emphasis ours.) It is true that he followed this up with the self-serving statement that he had never been employed by defendant but the nature of his dealings in the purchase and in the sale of liquors with appellee does not appear.

Bernon testified in answer to a question whether Weiner was the agent of the appellee as follows:

> "A. Let me answer that by stating that it has been the practice in the liquor industry for the last few years for agents to represent sellers and at the same time also acting as agents for buyers, due to the fact that the buyers have been unable to get enough merchandise to satisfy their needs; and that is the general practice in the liquor industry.
>
> Q. In this instance he was going to collect commission from you? A. In most instances they collect the commission from the seller, but still act as an agent for the buyer. In fact, some of the agents which we have had were paid commissions when they came to us, even though they were acting as agents for certain purchasers in the country. That is the usual practice since the—since the stopping of distillation by the Federal Government for commercial use." [Tr. p. 45.]

Bernon further testified directly that Weiner was acting as the agent for both parties [Tr. pp. 40, 41, 43, 26].

It is significant to note also that appellant's letter of June 5, 1944, addressed directly to appellee [Tr. p. 57] was not answered by appellee: Weiner answered it by his letter of June 7, 1944 [Tr. p. 62], stating: "This will acknowledge receipt of your letter dated June 5, addressed to the Los Angeles Liquor Company. . . ."

The fundamental rules applicable are as follows:

The existence of an agency and the extent of an agent's authority are questions of fact:

1 *Cal. Jur.* 697, 698;

1 *Cal. Jur.* 865.

Agency may be proved by circumstantial evidence:

McDonnell v. California Lands, Inc., 15 Cal. (2d) 344;

1 *Cal. Jur.* 696;

2 *Am. Jur.* 351.

A court is not bound by a statement of a party as to agency:

New York Indemnity Company v. Western Loan and Building Company, 139 Cal. App. 219.

A salesman on a commission basis is not necessarily an agent; in the cited case he was held to be an independent contractor:

Barton v. Studebaker Corporation of America, 46 Cal. App. 707, 189 Pac. 1025.

It thus appears that the question of Weiner's agency to appellee, even if assumed to be necessary to the introduction of communications between appellant and Weiner, was a highly disputed question and the conflict thereon in itself should have resulted in a denial of the motion.

Conclusion.

The appellee's efforts to worm out of a binding contract, arrived at after considerable negotiations, after appellant set aside the goods and lost the opportunity of selling them favorably elsewhere after the liquor holiday had intervened with its consequent depreciation in price, on the flimsy ground first assigned (in appellee's telegram) that Irven Rose was no longer connected with the company, then on the ground (in the answer) that appellee had not made a contract but merely offered to buy, then on the ground (in the answer to the interrogatory) that there was doubt in appellee's mind whether there would not be trouble in passing the brandy with California authorities, and finally (in its reply brief) that no price was agreed upon, shows a course of conduct at variance with fair dealing and should not receive the stamp of approval of a court of law.

Respectfully submitted,

Ezra K. Shapiro,
S. K. Walzer,
Benjamin, Lieberman & Elmore,
Attorneys for Appellant.